

NGO involvement in the WTO

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or half-empty?*

Peter Van den Bossche



2006-10

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NGO Involvement in the WTO

A lawyer's perspective on a glass half-full or half-empty?

*Peter Van den Bossche*¹

I. Introduction

The importance of non-governmental organisations ('NGOs') as international actors has increased sharply over the last decades. Since 1945, when NGOs were explicitly recognised as actors on the international scene by Article 71 of the United Nations Charter, NGOs have become an ever stronger and more vocal force in international policy-making, policy-implementation, compliance-monitoring and dispute-settlement. The interest and involvement of NGOs in the activities of international organisations has especially intensified since the early 1990s. At present, a continuously growing number of NGOs participates, or aspires to participate, in the work of international organisations. Many observers would agree with K. Raustiala that 'this growth of NGO activity may indicate an emerging transformation of the international legal and political system – a decline in the importance of the sovereign state and the state system and an accompanying rise of governance by a dynamic global civil society.'²

The most important reason for the empowerment of NGOs on the international plane is the phenomenon of globalisation and the growing need to find solutions for global problems. This has lead governments to engage in more negotiation, policy formation, and decision-making at the international level. More often than not, these activities at the international level have significant effects on domestic policy and legislation. In a number of fields there has, in fact, been a shift in the regulatory activity from the national to the international level. Consequently, many NGOs, which were formerly national in focus and organisational structure, have 'internationalised' in order to maintain their ability to participate in the policy debate and affect policy decisions.³

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² K. Raustiala, 'The "Participatory Revolution" in International Environmental Law', 21 *The Harvard Environmental Law Review*, 1997, 537, at 539.

³ See K. Nowrot, 'Symposium, The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Indiana Journal of Global Legal Studies*, 1999, 579, at 586-7.

As noted in the Cardoso Report of 2004 on the relationship between the United Nations and civil society, globalisation renders traditional forms of representation increasingly less relevant.⁴ This is because economics, trade, communications and culture are becoming more global, with more decisions being reached in international forums and organisations, whereas representative democracy remains essentially national and local. The Report suggests that as a result '[r]epresentative democracy, in which citizens periodically elect their representatives across the full spectrum of political issues, is now supplemented by participatory democracy, in which anyone can enter the debates that most interest them, through advocacy, protest and in other ways.'⁵ People are using internationally operating NGOs to express their political views and/or promote their interests. Effective involvement in – and influence over – the policy-making, policy-implementation, compliance-monitoring and/or dispute-settlement activities of international organizations is a chief objective – if not the *raison d'être* – of international NGOs.

International NGOs have definitely been quite keen to be involved in the activities of the World Trade Organization ('WTO'). As the primary international organisation concerned with trans-border trade, the WTO is at the forefront of the multilateral effort to manage and regulate economic globalisation. The law of the WTO governs the trade relations between its 149 Members and plays a crucial role in resolving trade disputes between these Members. Not surprisingly the WTO has emerged as a prime target for anti-globalist protest. When Mike Moore arrived at the headquarters of the World Trade Organization in the summer 1999 to begin his first day of work as the WTO's new Director General, he was welcomed by a small but noisy group of demonstrators. One of the demonstrators waved a sign saying 'Dieu est mort, l'OMC l'a remplacé!' (God is dead; the WTO has replaced him!). Another sign said 'Qui sème la misère récolte la colère!' (He who sows misery will reap anger) and a third sign said 'WTO = World Terror Organization'. This small demonstration was a sign on the wall of things to come. A few months later, the WTO Ministerial Conference in Seattle triggered large-scale demonstrations that degenerated in street battles between the police and protestors. After Seattle, there were several other mass demonstrations against the WTO, most recently in Hong Kong in December 2005 at the occasion of the bi-annual meeting of the WTO Ministerial Conference. As G. de Jonquières observed, this 'interest' in the WTO reflects 'growing public awareness – but often imperfect understanding – of its role in promoting, and formulating rules for, global economic integration'.⁶

This paper examines the nature and the extent of the involvement of NGOs in the activities of the WTO. First, it looks at the arguments for and against NGO involvement in WTO activities. Next, the paper discusses the legal basis for the involvement of NGOs in WTO activities and the various forms of involvement provided for. It compares the position of NGOs in the WTO with their position in other international organisations, and in particular the United Nations. Subsequently, the paper explores the practice of WTO engagement with NGOs. Finally, the paper examines and compares the rules and procedures of the WTO and the United Nations respectively for the selection of the NGOs with which to engage.

⁴ Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, *We the People, Civil Society, the United Nations and Global Governance* (Cardoso Report), A/58/817, dated 11 June 2004, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/376/41/pdf/N0437641.pdf?OpenElement>, visited on 15 August 2005.

⁵ *Ibid.*, para. 13.

⁶ G. de Jonquières, 'The WTO's Capacity to Arouse Controversy Highlights a Growing Public Awareness of its Role', *Financial Times*, 24 September 1999.

II. Arguments for and against NGO involvement

While not always wholeheartedly, international organizations have responded positively to the call of NGOs for more involvement and currently allow – to different extents and in different ways – NGOs to participate in their activities. This has also been the case for the WTO. However, the debate on the desirability of (greater) involvement of NGOs in the work of the WTO is all but settled.

There are four main *arguments in favour* of (greater) NGO involvement in WTO activities (as well as in the activities of most other international organisations). First, NGO participation will enhance the WTO decision-making process because NGOs will provide information, arguments and perspectives that governments do not bring forward. NGOs have a wealth of specialised knowledge, resources and analytical capacity. As Daniel Esty noted, NGOs can and should function as 'intellectual competitors' to governments in the quest for optimal policies.⁷ In fact, governments often lack the resources and very specific expertise necessary to investigate certain issues. NGOs may frequently be of help, enhancing the resources and expertise available and enriching the policy debate.

Secondly, NGO participation will increase the legitimacy of the WTO. In the eyes of many, the WTO is currently a secretive organisation in which the governments (of a few major trading nations), unsupervised by parliaments or civil society, set the agenda and push through rules that affect the welfare of people worldwide. WTO decision-making has been described as undemocratic and lacking transparency. For decision-making to be democratic, it must involve either directly or, more likely, through representation those that will be affected by the decisions taken. Furthermore, decisions must be reached as a result of an open and transparent exchange of rational arguments which allows those represented to 'watch-dog' the representatives.⁸ The legitimacy of the WTO and public confidence in the WTO will increase when NGOs have the opportunity to be heard and to observe the decision-making process. NGOs will contribute to ensuring that decisions result from the open exchange of rational arguments rather than from shady bargaining. Moreover, NGOs can play an important role in disseminating information at the national level, ensuring broader public support and understanding.

Thirdly, transnational interests and concerns may not be adequately represented by any national government. By allowing NGO involvement in WTO discussions, the WTO would hear about important issues which are international in nature.

Finally, civil society participation in the debate at the national level is only an option in those WTO Members with open and democratic processes at the national level. This is not the case for all WTO Members. Hearing NGOs at the WTO can thus compensate for the fact that NGOs are not always and everywhere heard at the national level.

There are equally four main *arguments against* (greater) involvement of NGOs in the work of the WTO. First, NGO involvement may lead the decision-making process to be captured by

⁷ See D. Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion', *Journal of International Economic Law*, 1998, 136.

⁸ See M. Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law', *Journal of World Trade*, 2001, 167-86.

special interests.⁹ Trade liberalisation produces diffuse and hard-to-quantify benefits for the general public while producing visible harm to specific and well-organised interests. The NGOs seeking access to the WTO are often entities representing special interests, not the interests of the general public. Thus, special interests may gain undue influence.

Secondly, many NGOs lack legitimacy. They are neither accountable to an electorate nor representative in a general way. NGOs typically advocate relatively narrow interests. Unlike governments, they do not balance all of society's interests. It is legitimate to ask questions regarding the actual constituency of an NGO and its financial backing.

Thirdly, most developing-country Members object to greater involvement of NGOs in the WTO because they view most NGOs, and in particular NGOs focusing on environmental or labour issues, as inimical to their interests. Moreover, NGOs of industrialised Members tend to be well organised and well financed. Allowing NGOs a bigger role may therefore further marginalise developing-country Members within the WTO decision-making process. In other words, it may tilt the negotiating balance further to their disadvantage.

Finally, WTO decision-making, with its consensus requirement, is already very difficult. NGO involvement will make negotiations and decision-making even more difficult. Further transparency will enable private interest groups to frustrate the negotiating powers of governments in WTO forums. Gary Sampson noted in this respect that 'national representatives must on occasion subordinate certain national interests in order to achieve marginally acceptable or sub-optimal compromises that, by definition, require trade-offs. Doubt is expressed whether such a system could continue to work effectively if these trade-offs were open to scrutiny by precisely those special interest groups that would have opposed them.'¹⁰

The essence of the debate on the pro's and con's of (greater) NGO involvement in international organisations was captured well by the authors of the Background Paper for the Cardoso Report when they concluded that 'well handled' involvement of NGOs in the policy-deliberation and decision-making processes of international organizations 'enhances the quality of decision-making, increases ownership of the decisions, improves accountability and transparency of the process and enriches outcomes through a variety of views and experiences'.¹¹ However, 'handled badly, it can confuse choices, hamper the intergovernmental search for common ground, erode the privacy needed for sensitive discussions, over-crowd agendas and present distractions at important meetings'.

The remainder of this paper will examine how the WTO 'handles' the involvement of NGOs in its activities and will compare this 'handling' with that by other international organisations

⁹ See J. Dunoff, 'The Misguided Debate over NGO Participation at the WTO', *Journal of International Economic Law*, 1998, 437 (reproduced by permission of Oxford University Press).

¹⁰ G. Sampson, 'Overview', in G. Sampson (ed.), *The Role of the World Trade Organization in Global Governance* (United Nations University Press, 2001), 11.

¹¹ *UN System and Civil Society: An Inventory and Analysis of Practices*, Background Paper for the Secretary-General's Panel of Eminent Persons on United Nations Relations with Civil Society, Introduction, May 2003. Available at: <http://www.un.org/reform/pdfs/hlp9.htm>, visited on 1 April 2005.

III. Legal Basis for and Forms of NGO Involvement

The *Marrakesh Agreement Establishing the World Trade Organization* (the ‘WTO Agreement’) explicitly empowers the WTO to engage with NGOs. Article V:2 of the WTO Agreement provides:

The General Council may make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Such explicit empowerment to engage with NGOs can also be found in the *UN Charter*. Article 71 of the *UN Charter* states:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.

Also the constituent instruments of other international organisations, such as the United Nations Conference on Trade and Development (‘UNCTAD’) and the International Labour Organization (‘ILO’), explicitly provide for engagement with NGOs. Note, however, that the constituent instruments of two international organizations with which the WTO has particularly close links and a shared responsibility for coherence in global economic policy-making,¹² namely the International Bank for Reconstruction and Development (‘World Bank’) and the International Monetary Fund (‘IMF’), do not provide for a legal basis for NGO involvement. While the latter did not prevent the World Bank and the IMF from engaging with NGOs,¹³ it is to be applauded that the WTO was explicitly empowered to engage with NGOs. The 1948 *Havana Charter on the International Trade Organization* (‘ITO’) contained a provision with wording similar to Article V:2 of the WTO Agreement.¹⁴ The ITO, however, never became operational and the 1947 *General Agreement on Tariffs and Trade* (‘GATT’) filled the gap left by the ITO for almost fifty years. The GATT, by contrast, did not have any provision on cooperation with NGOs. Under the GATT, informal and *ad hoc* contacts existed with NGOs. However, NGOs were denied access to meetings and conferences. That was also the case for the Marrakesh Conference in April 1994, at which the *WTO Agreement* was signed.¹⁵

Pursuant to the mandate given to it in Article V:2 of the *WTO Agreement*, the General Council of the WTO adopted in 1996 the *Guidelines for Arrangements on Relations with Non-Governmental Organizations* (the ‘1996 Guidelines’).¹⁶ In this one-page document Members recognised that NGOs can play a role ‘to increase the awareness of the public in respect of WTO activities’ and that NGOs are a ‘valuable resource’ that can ‘contribute to the accuracy and richness of the public debate’.¹⁷ In the *1996 Guidelines*, it was agreed that interaction with NGOs should be developed through the organisation of symposia for NGOs on specific WTO-related issues; informal

¹² See Article III:5 of the *WTO Agreement*.

¹³ Both the World Bank and the IMF take the position that engagement with NGOs is permissible as long as the general provisions of their Articles of Agreement are observed.

¹⁴ See Article 87(2) of the *Havana Charter on the International Trade Organization*.

¹⁵ NGOs as such were not invited to Marrakesh; those NGOs present were registered as members of the press.

¹⁶ Decision by the General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162, dated 23 July 1996.

¹⁷ *Ibid.*, paras. II and IV.

arrangements to receive the information NGOs may wish to make available for consultation by interested delegations; the continuation of past practice of the WTO Secretariat of responding to requests for general information and briefings about the WTO, and participation of chairpersons of WTO councils and committees in discussions and meetings with NGOs in their personal capacity.¹⁸

The 1996 Guidelines also made the limits of NGO involvement clear. In the concluding paragraph, the General Council referred to the special character of the WTO, which is both an intergovernmental organisation based on a binding treaty of rights and obligations among its Members *and* a forum for negotiations. The General Council then concluded:

As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.¹⁹

To this, the General Council added:

Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.²⁰

While Article V:2 of the *WTO Agreement* allows the General Council to provide for fully-fledged involvement of NGOs in WTO activities, the General Council opted in 1996 to transfer the main responsibility for engaging with civil society to the national level. Furthermore, the General Council instructed only the WTO Secretariat to engage with NGOs and effectively barred NGOs from participation in the activities of WTO bodies. While the legal basis in the *WTO Agreement* is broad enough to allow for this, NGOs do not have consultative status in any WTO bodies.

Although Article V:2 of the *WTO Agreement* and Article 71 of the *UN Charter* both empower in very similar wording²¹ their respective organisations to engage with NGOs, there is a world of difference in what they did, and do, with this mandate. Unlike the WTO, the United Nations and in particular the UN Economic and Social Council ('ECOSOC') has seized the opportunity to provide for forms of significant involvement. Pursuant to the mandate given to ECOSOC in Article 71 of the *UN Charter*, it adopted on 25 July 1996 Resolution 1996/31 on the 'Consultative Relationship between the United Nations and Non-Governmental Organizations'.²² This instrument is much more elaborate and provides for notably broader NGO involvement than the *WTO 1996 Guidelines*. Resolution 1996/31 provides for the granting of 'consultative status' to NGOs. There are three types of such status: general consultative status; special consultative

¹⁸ *Ibid.*, paras. IV and V.

¹⁹ *Ibid.*, para. VI.

²⁰ *Ibid.*, para. VI.

²¹ Article V:2 of the *WTO Agreement*: '...make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters ...'; and Article 71 of the *UN Charter*: 'may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters ...'.

²² *Resolution 1996/312* of the Economic and Social Council of 5 July 1996 on the 'Consultative Relationship between the United Nations and Non-Governmental Organizations', UN Document E/1996/31, available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>. Resolution 1996/31 updated the arrangements previously set out in Resolution 1296 (XLIV) of 23 May 1968.

status, and inclusion on the Roster. Each type of status corresponds with a different bundle of rights. An NGO in general consultative status:

- is informed of the provisional agenda of the Economic and Social Council and may propose to the Council Committee on Non-governmental Organizations (NGO Committee) that the Committee request the UN Secretary-General to place items of special interest on the provisional agenda of the Council;²³
- may orally present to the Council introductory statements of an expository nature on items included on the Council's agenda at the proposal of the NGO;²⁴
- may sit as an observer at public meetings of the Council and its subsidiary bodies;²⁵
- may submit written statements with a maximum of 2000 words for circulation to the Members of the Council;²⁶ and
- may make oral statements to the Council (at the recommendation of the NGO Committee and subject to the approval of the Council).²⁷

NGOs in *special consultative status* enjoy some of the same rights granted to NGOs in general consultative status²⁸. However, they cannot propose to place items on the agenda of the Council, nor can they make oral statements at meetings of the Council.²⁹ They may, however, speak at meetings of the Council's subsidiary bodies that deal with subject matters of specific interest to them.³⁰ Lastly, NGOs on the *Roster* are informed of the provisional agenda of the Council and may attend the meetings of the Council and its subsidiary bodies concerned with matters within their field of competence.³¹ NGOs on the Roster are consulted at the request of the Council or its subsidiary bodies.³² Resolution 1996/31 authorises NGOs in any type of consultative status to confer with officers of the UN Secretariat, and visa-versa.³³ Additionally, the Secretary-General is authorised to offer facilities to NGOs in any type of consultative status including: access to UN grounds, facilities (including conference space) and UN press documentation services and arrangement of informal discussions on relevant special interest topics.³⁴ Note that even the least privileged category of NGOs interacting with the Council (the category of 'NGOs on the Roster') has significantly more 'participation' rights than are granted to NGOs under the 1996 Guidelines of the WTO General Council.

IV. Practice of WTO Engagement with NGOs

²³ *Ibid.*, paras. 27-28.

²⁴ *Ibid.*, para. 32 (b).

²⁵ *Ibid.*, paras. 29 and 35.

²⁶ *Ibid.*, para. 30.

²⁷ *Ibid.*, para. 32 (a).

²⁸ They are informed of the provisional agenda of the Council (*ibid.*, para. 27); they may sit as observers at public meetings of the Council and its subsidiary bodies (*ibid.*, paras. 29 and 35); and they may submit written statements with a maximum of 500 words for circulation to the Members of the Council (*ibid.*, para. 31 (e)).

²⁹ *Ibid.*, para. 38 (a).

³⁰ *Ibid.*, para. 32 (a).

³¹ *Ibid.*, paras. 27 and 29.

³² *Ibid.*, para. 24.

³³ Such consultations may be conducted upon the request of the NGO or upon the request of the Secretary-General (*ibid.*, para. 65). Also, the UN Secretary-General may request an accredited NGO to carry out specific studies or prepare specific papers (*ibid.*, para. 66).

³⁴ *Ibid.*, para. 67.

There is often a marked difference between, on the one hand, the forms of NGO involvement provided for in the constituent and/or secondary legal instruments of an international organization and, on the other hand, the practice of NGO involvement in the activities of that international organization or the engagement of that organization with NGOs. A prime example of such difference is the engagement of the World Bank and the IMF with NGOs. This engagement is not provided for in any legal instrument and yet, this engagement is – albeit limited – a reality. Also the involvement of NGOs in the activities of the United Nations goes beyond what is provided for in ECOSOC Resolution 1996/31 as a practice has evolved to allow for a certain degree of informal participation by NGOs in the work of the General Assembly’s main committees and several of its subsidiary bodies, as well as in special sessions of the Assembly.³⁵

In practice, the principal forms of WTO engagement with NGOs at present are:

- attendance of the formal plenary meetings of the Ministerial Conference;
- public symposia and forums on WTO-related issues;
- access to WTO information;
- opportunities for information exchange;
- informal meetings with NGO;
- the Informal NGO Advisory Body; and
- involvement in dispute settlement.

1. Attendance of the plenary meetings of the Ministerial Conference

While its *1996 Guidelines* of July 1996 did not provide for this, the General Council decided in the run-up to the first Session of the WTO’s Ministerial Conference in Singapore in December 1996 that NGOs would be invited to attend the formal plenary meetings of the Ministerial Conference. It was also decided that an NGO Centre with facilities for organizing meetings and workshops would be set up alongside the official Conference Centre in Singapore. The 108 NGOs that attended the first Session of the Ministerial Conference, did, however, not have observer status; they were not allowed to make any oral statements at, or submit written statements to, the meetings they could attend. Since the Singapore Session, the number of NGOs represented has increased with each Session, with the exception of the Doha Session, when limited local facilities (and other restrictions) did not allow a large number of NGOs. For the Hong Kong Session of the Ministerial Conference in December 2005, the number of accredited NGOs had reached 1065, of which 836 actually attended.

Trend in NGO Representation at Sessions of the Ministerial Conference³⁶

| | Number of | NGOs attended |
|--|-----------|---------------|
|--|-----------|---------------|

³⁵ See *Reference document on the participation of civil society in United Nations conferences and special sessions of the General Assembly during the 1990s*, version 1 August 2001, prepared by the Office of the President of the Millennium Assembly, 55th session of the United Nations General Assembly, available at <http://www.un.org/ga/president/55/speech/civilsociety1.htm>, paras. 13-20.

³⁶ See http://www.wto.org/english/news_e/news03_e/ngo_minconf_6oct03_e.htm, visited on 8 February 2004 and http://www.wto.org/english/thewto_e/minist_e/min05_e/list_ngo_hk05_e.pdf, visited on 12 October 2006.

| | accredited NGOs | |
|-----------------------|-----------------|-----|
| Singapore 1996 | 159 | 108 |
| Geneva 1998 | 153 | 128 |
| Seattle 1999 | 776 | 686 |
| Doha 2001 | 651 | 370 |
| Cancún 2003 | 961 | 795 |
| Hong Kong 2005 | 1065 | 836 |

Although the attendance of the formal plenary meetings of the Ministerial Conference has now become a well-established practice, there is no standing legal arrangement for the participation of NGOs in these meetings yet. For each Session of the Ministerial Conference, the General Council has to agree on NGO attendance and determine the modalities of this attendance.³⁷ As for the previous Sessions, the attendance by NGOs of meetings of the Ministerial Conference at the Hong Kong Session in December 2005 was limited to the formal plenary meeting of the Ministerial Conference. Note that at such meeting little more happens than the reading out by heads of government or trade ministers of short prepared statements of a general nature. NGOs are not allowed to make any statement, whether orally or in writing, to the Ministerial Conference. The fact that the formal plenary meetings of the Ministerial Conference are now web-casted makes the right of NGOs to attend them even less meaningful. Access to all other meetings, including of course negotiating sessions, is denied. As at previous Sessions, NGOs were also at the Hong Kong Session provided with an NGO centre, equipped with office and media facilities, and were briefed about the conference developments by WTO Secretariat officials. Note, however, that to improve transparency and inclusiveness, in Hong Kong, for the first time, NGOs were accommodated under the same roof as the delegates of the WTO Members.³⁸

2. Public symposia and forums

As provided for by the *1996 Guidelines*, in the second half of 1990's a number of symposia for NGOs and delegations of Members on specific issues was organised by the WTO Secretariat. Three of these symposia concerned the issue of trade and the environment, one the issue of trade and development and one the issue of trade facilitation.³⁹ These first symposia were organised in a form of plenary sessions with hundreds of participants gathered in one room. Such format was criticised as ineffective because it resulted in poorly focused discussions and overly general conclusions.⁴⁰

³⁷ For the latest of these decisions, see WTO Ministerial Conference, *Procedures Regarding Registration and Attendance of Non-Governmental Organizations at the Sixth Session of the Ministerial Conference*, WT/MIN(05)/INF/6, dated 1 June 2005.

³⁸ The NGOs were provided with an entire floor with support staff and copying equipment, a computer room, and about 10 meeting rooms for purposes of their lobbying activities and meetings. NGOs were also provided with an information hall, where the WTO proceedings and briefings as well as the daily NGO meetings programme were on video-display throughout the day, and where relevant NGO literature could be displayed and made available on a continuous basis. The information hall was visited by hundreds of delegates during the conference proceedings. See Esmé D. du Plessis, Co-Chair Committee Q94, *Report to AIPPI* (February 2006), p. 7, available at http://www.aippi.org/reports/q94/report_wto_6th_ministerialconf.pdf, visited on 18 October 2006.

³⁹ See http://www.wto.org/english/forums_e/ngo_e/intro_e.htm, visited on 1 November 2005.

⁴⁰ See S. Charnovitz, 'Opening the WTO to Non-Governmental Interests', 24 *Fordham International Law Journal*, 2000, 173, at 191, 214; G. Marceau and P. Pedersen, 'The World Trade Organization and Civil Society', 33 *Journal of World Trade*, 1999, 5, at 18.

In reaction to this criticism, in 2000 the WTO changed the format of symposia and has now turned them into annual 2- or 3-day events featuring many separate workshops and seminars where panellists and interested participants discuss a broad range of topical WTO-related issues. These annual symposia are financed from extra-budgetary sources, in particular voluntary contributions of WTO Members, such as Norway.

Since 2005, the WTO does not exercise control anymore over issues to be discussed, speakers, panellists or other participants. Its role in the organisation of these symposia is now confined to matters such as arranging for rooms, interpretation and financial support to speakers from developing countries. Themes of seminars and workshops that constitute the symposium are suggested by NGOs themselves (and other organisers such as academic institutions). Any NGO may approach the WTO Secretariat with a suggestion to organise a workshop on a particular issue of interest to it. The NGO itself then determines the speaker(s) and/or the panellists. The WTO does not interfere with this process. As up to five or six workshops can take place simultaneously, this creates a refreshing competitive atmosphere between NGOs (and other organisers) who are all competing for the attention of the participants to the Symposium.

At the WTO Public Symposium of May 2004 on “*Multilateralism at the Crossroads*”, there were almost 1,200 registered participants and 150 speakers. This three-day event featured a total of 29 workshops on the agricultural negotiations, on the prospects for developing countries after the failure of the Cancún Session of the Ministerial Conference, on trade liberalisation and sustainable development, on the environment and biodiversity, on South-South cooperation and on the challenges presented by regional trade agreements.⁴¹

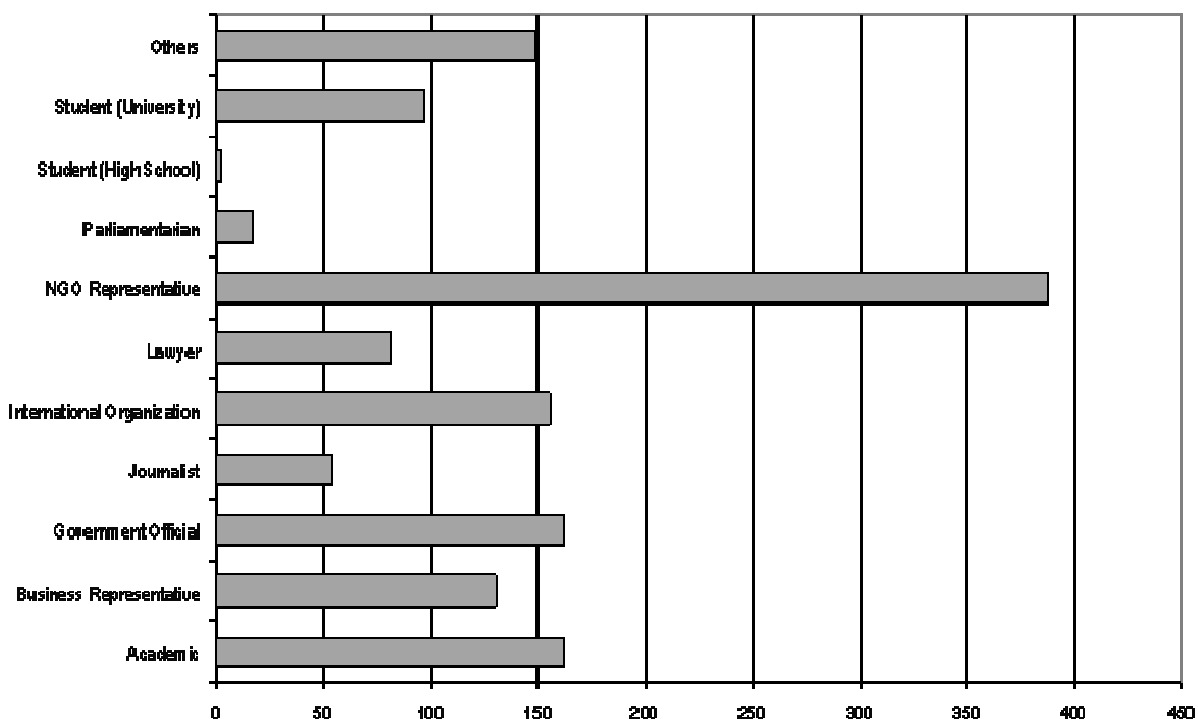
At the WTO Public Symposium of April 2005 on ‘*WTO After 10 Years: Global Problems and Multilateral Solutions*’, most of the discussions focused on the Doha Development Round negotiations, with much attention devoted to agricultural trade. Some 23 workshops were held on a wide variety of themes, with between 5 to 6 concurrent sessions held each morning or afternoon.

At the WTO Public Forum of September 2006 on ‘*What WTO for the XXIst century?*’, there were 1 532 registered participants, among which many NGO representatives but also academics, business representatives and officials of international organisations.

Breakdown by category of the on-line registered participants for the 2006 Public Forum⁴²

⁴¹ A. Lofthouse and F. Jubany, Report for International Trade Canada on WTO Public Symposium ‘Multilateralism at the Crossroads’ (June 2004). Available at <http://www.dfait-maeci.gc.ca/tna-nac/WTO-NGO-en.asp>, visited on 1 November 2005.

⁴² See http://www.wto.org/english/forums_e/public_forum_e/forum06_e.htm visited on 16 October 2006. Note that 1396 participants registered on-line for the 2006 Public Forum. An 136 additional people were registered manually after the expiry date of the on-line registration.



The public symposia or - as they seem to have been re-baptised in 2006 – public forums do not lead to any specific outcomes, such as, for example, a civil society statement to the WTO Ministerial Conference or General Council. While in the context of other international organisations, similar meetings of representatives of civil society organisations have in the past lead to civil society statements, this is not the ambition of the WTO public symposia and forums. Their aims have been more modest, namely to facilitate the exchange of views and perspectives on WTO issues in a frank and open way and to allow participants to network and establish contacts. In view of these aims, the lukewarm participation of diplomats and other government officials of WTO Members has been a source of frustration for NGOs.

3. Access to WTO information

In the absence of a right to attend meetings of WTO bodies, the right of access to documents produced in the course of, and in relation to, these meetings becomes essential for NGOs that wish to keep WTO activities under scrutiny. In parallel with the *1996 Guidelines*, the General Council adopted procedures for the de-restriction and circulation of WTO documents, establishing the basic principle that most documents would be immediately circulated as unrestricted. However, this principle was, at the time, still subject to important exceptions. In particular, working documents, minutes of WTO meetings, WTO Secretariat background papers and Ministerial Conference summary records were only de-restricted, and thus made available to the public, after eight to nine months. In 2002, after years of discussion, the General Council reached a decision to accelerate de-restriction of official WTO documents, cutting the time

period in which most documents are made publicly available to 6-12 weeks, and also reducing significantly the list of exceptions.⁴³

Therefore, today most WTO documents are immediately available to NGOs and the public at large, and those documents that are initially restricted are de-restricted much faster. All unrestricted WTO documents have been made available online, in all three official WTO languages (English, French and Spanish).

Further, since 1998, the External Relations Division of the WTO Secretariat has been organising briefings for NGOs on meetings of WTO bodies. Normally, NGO briefings are held after meetings of the General Council and of the Trade Negotiations Committee. Usually between 20 and 30 NGOs attend them. They are mostly NGOs with an office in Geneva.⁴⁴ If there are other NGOs that would like to attend, they have to send a request to the External Relations Division.⁴⁵

4. Opportunities for information exchange

Since 1998, the WTO website has a special NGO-page '*For NGOs*'.⁴⁶ This page holds specific information on NGO-related WTO activities (such as the Public Symposia and Forums) and on NGO participation in past (and future) Sessions of the Ministerial Conference (including announcements of registration procedures and deadlines).

Furthermore, the WTO Secretariat, and in particular the External Relations Division thereof, compiles – also since 1998 – a monthly list of position papers it receives from NGOs. This list is circulated to the WTO Members. A copy of any of these NGO position papers can be obtained from the WTO Secretariat. All NGO position papers received are also posted on the NGO-page of the WTO website and can easily be downloaded. The WTO Secretariat only includes in the monthly list and posts on the NGO-page, position papers relating to WTO issues and activities.⁴⁷ The September 2006 List included position papers on '*Redressing Trade and Development Imbalances Remains an Urgent Task*' from the Fair Trade Alliance (Philippines); on '*The Evolving Debate on Trade and Labour Standards*' from the International Organization of Employers (Switzerland); and on '*Review of the EU Agricultural Distorting Supports to Rebuild Fair and Sustainable Agricultural Trade Rules after the Doha Round Hibernation*' from Solidarité (France). The WTO Secretariat reserves the full right not to include on the list, material which, in its opinion, does not relate to WTO issues or activities.

5. Informal meetings with NGOs

⁴³ Decision of the General Council, *Procedures for the Circulation and De-restriction of WTO Documents*, WT/L/452, dated 16 May 2002.

⁴⁴ The WTO informs Geneva-based NGOs about the briefings by email.

⁴⁵ Having satisfied itself that it is indeed an NGO, the External Relations Division includes the applicant into the list of participants.

⁴⁶ See http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm.

⁴⁷ Newsletters, brochures and announcements will not be included in the list.

The *1996 Guidelines* envisaged the possibility for chairpersons of WTO councils and committees to meet with NGOs. There are no written procedures that would govern such meetings. They usually take place at the initiative of Geneva-based NGOs, which use them as yet another opportunity to keep up to date with the developments in WTO negotiations. Sometimes meetings are held upon the suggestion of the relevant chairperson or of the WTO Secretariat, but in most cases, the WTO Secretariat is not involved in the organisation. The information about upcoming meetings is rarely published; it is circulated within NGO networks informally. There is no NGO selection but participation is naturally confined to those NGOs that know about the meeting. Usually during these meetings NGOs and chairs of relevant councils/committees exchange information and views, mostly in relation to ongoing negotiations. Due to the informal nature of these meetings, with few exceptions, no reports are issued.

Similar informal meetings take place between NGOs and WTO Secretariat staff from various divisions. These may be devoted to negotiations or cover technical issues of interest to NGOs. There is no schedule for these meetings; they are organised on an *ad hoc* basis, but normally some WTO-NGO interaction of this nature occurs almost every week.

Additionally, 3-4 times a year, the WTO Secretariat organises presentations of NGO studies or publications. These presentations are primarily organized for the benefit of delegates of WTO Members. However, whether due to the busy agenda of these delegates or the often technical and specific nature of the presentations, they have aroused limited interest to date.

6. Informal NGO Advisory Body

Unlike some other international organisations, such as the United Nations Development Programme ('UNDP') and the World Bank, the WTO does not have a permanent body through which a formal "dialogue" between the WTO Members and civil society, including NGOs, can take place. Suggestions to establish such consultative bodies have received little support from WTO Members. However, in 2003 the then WTO Director-General, Dr. Supachai Panitchpakdi, took a personal initiative to establish the *Informal NGO Advisory Body* and the *Informal Business Advisory Body*. Both advisory bodies were established as informal bodies because under the *1996 Guidelines* the Director-General does not have a mandate to formally institutionalise relations with NGOs in such a manner.

The Informal NGO Advisory Body, made up of ten high level representatives from NGOs, was designed to provide a platform for dialogue between the WTO Director-General (not the WTO Members) and NGOs from around the world. To form the Informal NGO Advisory Body, the Director-General selected, on a discretionary basis, those NGOs that he considered to be influential and broadly representative, and seeking, where possible, to maintain regional balance and balance between NGOs from developed and developing countries.⁴⁸ The main function of

⁴⁸ Interestingly, Friends of the Earth International and Oxfam International have rejected the invitation to become a member, arguably because of fears of criticism from their peers and potential bad publicity. Perhaps for the same reason, the NGOs that had agreed to participate asked the Director-General to abstain from publicising the existence of the Advisory Body. That is why the

the Informal NGO Advisory Body is to advise the WTO Director-General on the WTO-related matters and to channel the positions and concerns of civil society on international trade. Although the Director-General is not a party to WTO negotiations, he is the Chairman of the Trade Negotiations Committee and thus can serve as an intermediary between NGOs and the WTO membership. So far, the Informal NGO Advisory Body has met three times (once a year) and during these meetings has mostly discussed the state of play in the ongoing trade negotiations, with participants exchanging their views and identifying issues of mutual concern. Participants have also discussed with the Director-General ways of improving WTO relations with civil society. These meetings have not resulted in any specific outcomes, such as official meeting reports or NGO statements that would be communicated to the WTO membership, for example.

7. Involvement in WTO dispute settlement

Settlement of trade disputes between WTO Members is one of the most important and successful functions of the WTO. Members, both developed and developing countries, make active use of the WTO dispute settlement system. A significant number of disputes dealt with by the WTO dispute settlement panels and the Appellate Body concerned national environmental legislation (*US – Gasoline*; *US – Shrimp*), public health legislation (*EC – Hormones*; *EC – Asbestos*) and other legislation of particular interest to NGOs (*EC – Bananas*; *EC – Tariff Preferences*). Not surprisingly, NGOs have looked for ways to make their voice heard by panels and the Appellate Body. This is not self-evident since WTO proceedings are closed to the public. Consultations, panel proceedings and appellate review proceedings are all confidential. Proposals by the European Communities and the United States in the context of the Doha negotiations on the reform of the DSU to open hearings of panels and the Appellate Body to the public have received very little support from other WTO Members. However, in September 2005, at the explicit request of the parties to the dispute (the European Communities, the United States and Canada), a WTO panel opened, for the first time, its hearings to the public. In the long-standing *EC – Hormones* dispute, the Panel authorized its proceedings were to be broadcasted through closed-circuit television at the WTO headquarters to an audience consisting mainly of diplomats, NGO representatives, media and academics. Up to 400 people could observe the meetings.⁴⁹ To date, this has been the only time that WTO dispute settlement hearings were public and could be attended by interested NGOs. While, theoretically, panels could open up their hearings without the agreement of the parties to the dispute, it is unlikely that they will do so. More, the parties will probably have to take the initiative and request the panel to open up its hearings. Few parties are willing to do this.

In a number of disputes, environmental and human rights NGOs, labour unions and industry associations have attempted to make themselves heard and to influence the outcome of disputes

WTO website does not include any information on it. Members of the informal NGO Advisory Body include Consumers International, Consumer Unity and Trust Society, the International Federation of Agricultural Producers, World Wide Fund for Nature (WWF) International, Third World Network, Christian Aid, the International Confederation of Free Trade Unions, Public Services International, the International Center for Trade and Sustainable Development, and the International Institute for Sustainable Development. See WTO Reporter, 17 June 2003.

⁴⁹ See *BRIDGES Weekly Trade News Digest*, Vol. 9, Number 30, 14 September 2005.

by submitting unsolicited written briefs, commonly referred to as *amicus curiae* briefs ('friend of the court' briefs). NGO briefs can be attached to parties' submissions or be submitted independently. They can serve at least three different functions: (1) providing legal analysis and interpretation; (2) providing factual analysis as well as evidence; and (3) placing the trade dispute into a broader political and social context.⁵⁰ NGOs can advance arguments WTO Members fear using because they are concerned that later, in other disputes, those arguments may be used against them.⁵¹ As of 2003, more than seventy NGOs have submitted *amicus curiae* briefs either to panels or the Appellate Body.⁵² The acceptance by panels and the Appellate Body of these *amicus curiae* briefs has been controversial and criticised by most WTO Members.

In *US – Shrimp*, the Appellate Body came to the conclusion that panels have the authority to accept and consider *amicus curiae* briefs.⁵³ It is by no means a right for NGOs and other friends of the court that their briefs are accepted and considered (unlike the briefs of parties and third parties), but it is the right of panels to do so if they consider it useful to decide the case. A few panels in later disputes did, on the basis of this ruling of the Appellate Body in *US – Shrimp*, accept and consider *amicus curiae* briefs. However, in most instances panels refused to accept and consider *amicus curiae* briefs submitted to them.⁵⁴ In *US – Lead and Bismuth II*, the Appellate Body ruled with respect to its own authority to accept and consider *amicus curiae* briefs submitted in appellate review proceedings. It concluded that it had the legal authority to decide whether or not to accept and consider any information that it believed to be pertinent and useful in rendering its decision. However, in this particular case, the Appellate Body did not find the two *amicus curiae* briefs filed to be useful.⁵⁵ In October 2000, the Appellate Body Division hearing the appeal in *EC – Asbestos* adopted an Additional Procedure, to deal with *amicus curiae* briefs which the Appellate Body expected to receive in great numbers in that dispute.⁵⁶ It adopted this Additional Procedure in the 'interests of fairness and orderly procedure'.⁵⁷ The Procedure required applicants to file for leave to submit a brief. The application had to respond to a set of questions, among them information on the objectives and financing of the applicant and how the proposed brief would make a contribution that is not likely to be repetitive of what the parties in the dispute have already said. While eventually the Appellate Body did not give any applicant leave to submit its *amicus curiae* briefs,⁵⁸ most WTO Members were infuriated by the Appellate Body's adoption of the Additional Procedure and its apparent willingness to accept and consider *amicus curiae* briefs (provided certain requirements are fulfilled). At a tumultuous Special Meeting of the General Council in November 2000, most Members expressed the

⁵⁰ L. Johnson and E. Tuerk, 'CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View' in T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni (eds.), *Civil Society, International Courts and Compliance Bodies* (T.M.C. Asser Press, 2005), pp. 243-260 at p.249.

⁵¹ S. Charnovitz, 'Participation of Non-Governmental Organizations in the World Trade Organization', 17 *University of Pennsylvania Journal of International Economic Law*, 1996, 331, at 353.

⁵² M. Jeffords, 'Turning the Protester into a Partner for Development: The Need for Effective Consultation Between The WTO and NGOs', 28 *Brooklyn Journal of International Law*, 2003, 937, at 961.

⁵³ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, paras. 104, 105 and 106.

⁵⁴ Note that the acceptance and consideration of *amicus curiae* briefs attached to the submissions of parties and third parties to the panel or the Appellate Body are not controversial (anymore).

⁵⁵ Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("US – Lead and Bismuth II"), WT/DS138/AB/R, adopted 7 June 2000, paras. 39 and 42.

⁵⁶ See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, paras. 51-52.

⁵⁷ *Ibid.*

⁵⁸ In response to the form-letter rejections, several NGOs issued a critical press statement. The statement complained that the Appellate Body gave no reason for the rejections. Among the signatories to the statement were two large environmental NGOs, the WWF, and Greenpeace International. See S. Charnovitz, 'Opening the WTO to Non-Governmental Interests', 189.

opinion that since there was no specific provision regarding *amicus* briefs, such briefs should not be accepted. In his concluding remarks the Chair of the General Council stated that: ‘in the light of the views expressed and in the absence of clear rules, he believed that the Appellate Body should *exercise extreme caution* in future cases until Members had considered what rules were needed.’⁵⁹ To date, WTO Members have been unable to adopt any rules on *amicus curiae* briefs. The Appellate Body has repeatedly confirmed its case law on the authority of panels and the Appellate Body to accept and consider these briefs. In no appellate proceedings thus far, however, has the Appellate Body considered it useful in deciding on an appeal to accept and consider *amicus curiae* briefs submitted to it.

Two additional observations with regard to a possible involvement of NGOs in WTO dispute settlement should be made. First, pursuant to Article 13 of the Dispute Settlement Understanding, a panel has the right to seek information and technical advice from any individual or body which it deems appropriate. Panels could thus call on NGOs for information and technical advice. Note, however, that the requirements of the *Rules of Conduct* for WTO dispute settlement, and in particular the requirements of independence and impartiality, also applies to all those which a panel calls on for expert information and advice. Second, it is accepted since the relevant Appellate Body ruling in *EC – Bananas*,⁶⁰ that parties and third parties are free to determine for themselves the composition of their delegation at hearings of panels and the Appellate Body. It is, therefore, possible for a party or third party to include NGO representatives in its delegation or, even to retain an NGO representative as its legal counsel.⁶¹

V. Rules and Procedures for the Selection of NGOs

Ever more NGOs with very different objectives wish to be involved in the policy-making, policy-implementation, compliance-monitoring and dispute-settlement activities of international organizations. For good reason, international organizations want to keep the number of NGOs involved in their activities ‘manageable’ and also want to avoid the involvement of NGOs which could potentially harm them in their efforts to achieve their objectives. A selection among NGOs thus seems to impose itself. Selection is needed to ensure that only NGOs that ‘add value’ to the policy-making, policy-implementation, compliance-monitoring and dispute-settlement activities ‘enjoy’ specific forms of involvement and associated rights. To this end, a number of international organisations, and most prominently the United Nations, have elaborate rules on accreditation. These rules include:

- substantive rules setting out the requirements that a NGO must meet to be accredited; and
- procedural rules for taking decisions regarding accreditation and the subsequent monitoring of accredited NGOs.

ECOSOC Resolution 1996/31 on the ‘Consultative Relationship between the United Nations and Non-Governmental Organizations’, already discussed above, is quite specific about the

⁵⁹ Emphasis added. See Minutes of the General Council Meeting of 22 November 2000, WT/GC/M/60, dated 23 January 2001, para. 120.

⁶⁰ See *EC – Bananas*, para. 10. This reasoning was later confirmed for panel proceedings.

⁶¹ NGOs such as International Lawyers and Economists Against Poverty or the Geneva-based International Commission of Jurists would, in principle, be able to provide parties and third parties with specialized legal expertise much needed in WTO proceedings.

requirements which NGOs must meet in order to be accredited and thus conferred consultative status. Pursuant to Resolution 1996/31, the NGOs must, first of all, be concerned with matters falling within the (very broad) competence of the Council and its subsidiary bodies.⁶² It must be able to demonstrate that its programme of work is of direct relevance and can contribute to the mission of the United Nations.⁶³ The aims and purposes of the NGO must be in conformity with the spirit, purposes and principles of the *UN Charter*.⁶⁴ Secondly, the NGO must also have recognized standing within its field of competence.⁶⁵ Thirdly, the NGO must have an established headquarters with an executive officer;⁶⁶ a democratically adopted constitution;⁶⁷ a representative and accountable inner structure;⁶⁸ and the authority to speak for its members.⁶⁹ Fourthly, as regards the funding of the NGO, the basic resources must be derived from either national affiliates or from individual members.⁷⁰ Finally, the NGO must attest that it has been in existence for at least two years at the date of receipt of its application for consultative status.⁷¹ As explicitly stated in Resolution 1996/31, decisions regarding arrangements for consultation should be guided by the principle that they are made, *on the one hand*, for the purpose of enabling the Council or one of its subsidiary bodies to secure expert information or advice from NGOs having special competence in the relevant subjects, and *on the other hand*, to enable international, regional, sub-regional and national NGOs that represent important elements of public opinion to express their views.⁷² Therefore, the arrangements for consultation made with each NGO should relate to the subjects in which that NGO has special competence or in which it has a special interest.⁷³ Consequently, the decisive factor in which form of consultative status will be granted (general, special, or roster) is the scope of the NGOs activities and competence. For the general status, it must be as broad as, or at least comparable to, that of ECOSOC; for special status the NGO's scope must cover a few relevant fields; for Roster status, a narrower scope is permitted. Finally, in selecting NGOs, ECOSOC must to the extent possible, encourage the participation of NGOs, in order to help achieve a just, balanced, effective and genuine involvement of NGOs from all regions and areas of the world.⁷⁴

As set out in detail in ECOSOC Resolution 1996/31, an NGO must to obtain consultative status with ECOSOC and/or its subsidiary bodies submit an application, which is then reviewed by ECOSOC's Committee on NGOs (or NGO Committee). The NGO Committee consists of 19 Member States that are elected every four years by the Council on the basis of equitable geographical representation.⁷⁵ The Committee, which meets twice each year, in practice discusses all new applications during informal meetings prior to its formal sessions. NGO applications are grouped into two lists. List 1 includes 'unproblematic' NGOs; List 2 features those NGOs that

⁶² Resolution 1996/312 of the Economic and Social Council of 5 July 1996 on the 'Consultative Relationship between the United Nations and Non-Governmental Organizations', UN Document E/1996/31, para. 1.

⁶³ *Ibid.*, paras. 3 and 8.

⁶⁴ *Ibid.*, para. 2. This requirement may be used to exclude NGOs that advocate violence, racial discrimination or disrespect for human rights.

⁶⁵ *Ibid.*, para. 9.

⁶⁶ *Ibid.*, para. 10.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, para. 12.

⁶⁹ *Ibid.*, para. 11.

⁷⁰ *Ibid.*, para. 13. This requirement may be waived if an NGO provides a satisfactory explanation in accordance with paragraph 13.

⁷¹ *Ibid.*, para. 61 (h).

⁷² *Ibid.*, para. 20.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, para. 5

⁷⁵ *Ibid.*, para. 60

gave rise to questions from one or more delegations. These questions are sent to the NGOs concerned so that they may respond until the beginning of the formal session of the NGO Committee.⁷⁶ If Member States are not satisfied with answers received from a particular NGO, its application is deferred and additional questions are posed. After deliberations on each NGO, the chairperson of the Committee usually suggests recommending special consultative status and if there are no objections or proposals to change the type of status (into general or Roster) from Member States, this recommendation will be transmitted to ECOSOC for final approval. In difficult cases, the NGO Committee may turn to voting before submitting their recommendation. At its session in January 2006, the NGO Committee considered 99 NGOs and recommended that 60 were put on List 1 and 39 on List 2. The final decision is taken by ECOSOC itself.

An NGO granted general or special consultative status with ECOSOC is under an obligation to submit a report on its activities every four years.⁷⁷ This report, commonly referred to as the quadrennial report, allows the NGO Committee to review whether the NGO concerned continues to satisfy the substantive criteria of consultative status as set out above. If the Committee is of the opinion that this is not the case, it can recommend to ECOSOC the reclassification, the suspension (for up to three years) or withdrawal of the NGOs consultative status.⁷⁸ To date, ECOSOC has suspended or withdrawn the consultative status of only a few NGOs.

In sharp contrast with the elaborate ECOSOC substantive and procedural rules on accreditation, WTO law provides for virtually no rules to ensure that the WTO only engages with NGOs that 'add value' to its policy-making, policy-implementation, compliance-monitoring and dispute-settlement activities. Article V:2 of the *WTO Agreement* merely states that the WTO should restrict its engagement to NGOs '*concerned with matters related to those of the WTO*'. The *1996 Guidelines* do not provide for any further accreditation requirements or selection criteria. There are also no specific procedural rules for the decisions on accreditation.

When the WTO was first confronted with the problem of accrediting NGOs on the occasion of the first Session of the Ministerial Conference in Singapore in December 1996, the WTO Secretariat accredited *all* non-profit NGOs that could point to activities related to those of the WTO. The applicant-NGOs were not submitted to any further examination of their objectives, membership, institutional structure or financing.⁷⁹ Apart from the criterion of 'WTO-related activities', the only additional accreditation criterion applied at the time was the '*non-profit*

⁷⁶ In many instances, these questions have little to do with the compliance of the NGO with the established accreditation criteria, but have to do more with political sensitivities of particular states. To give just one example, at the January 2006 session of the NGO Committee, Cuba posed the question to an NGO that focused on human rights violations 'in the Global South' whether this NGO considered that there were no human rights violations 'in the Global North'. Although this NGO eventually was granted special consultative status, the example is illustrative.

⁷⁷ *Ibid.*, para. 61 (c) Under 'exceptional circumstances', the NGO Committee can ask for a report between the regular reporting dates. The Committee may ask for such special report when it is informed of an act or a pattern of acts of the NGO concerned which could lead to suspension or withdrawal of the consultative status. See *ibid.*

⁷⁸ There are three cases in which the consultative status of an NGO may be suspended for up to three years or withdrawn:

- (1) if an NGO clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the *UN Charter*, including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with *Charter's* purposes and principles;
- (2) if there exists substantiated evidence of influence from proceeds resulting from internationally recognized criminal activities such as illicit drugs trade, money-laundering or illegal arms trade;
- (3) if, within the preceding three years an organization did not make any positive or effective contributions to the work of the United Nations and, in particular, to the work of ECOSOC or its subsidiary organs (*Ibid.*, para. 57).

⁷⁹ It has been suggested that such examination was beyond the resources of the WTO Secretariat.

character' of the NGO. Private companies and law firms were refused accreditation on this basis.

This practice continued at subsequent Sessions of the Ministerial Conference. The WTO Secretariat merely checked the WTO-related nature of the activities of the applicant NGO and its non-profit character.⁸⁰ Rather than a system of selection and accreditation of NGOs, the WTO applies in fact a simple system of *ad hoc* registration for *one* event, namely the bi-annual Session of the Ministerial Conference. This registration/accreditation system of NGOs for the bi-annual sessions of the Ministerial Conference is basically left to the discretion of the WTO Secretariat, although the WTO General Council, of course, can address any issue concerning accreditation/registration that may arise in the run-up to a session of the Ministerial Conference.⁸¹ Note that despite these rather lax criteria for accreditation/registration, only 1,065 NGOs out of roughly 1,630 applicants were accredited for the 2005 Hong Kong Session of the Ministerial Conference. Of those *not* accredited, about 220 requests for accreditation were not processed because of lack of further response or information from NGOs. The remaining requests were refused for a variety of reasons (no or insufficient evidence of WTO-related activities or of the non-profit character). Due to the high number of requests for registration for the Hong Kong Session of the Ministerial Conference, the WTO was stricter in sieving applications than was customary for earlier Sessions. Reportedly, applications from pure research institutions or student associations, which do not have any advocacy functions, or similar features that usually characterise NGOs, were refused.

While the quasi-absence of WTO rules and procedures for the selection of NGOs should be noted with concern, it could be argued that as long as NGO involvement in WTO activities remains as modest as it currently is, there is very little use for elaborate accreditation rules and procedures. The 2005 Sutherland Report on '*The Future of the World Trade Organization*' noted in this respect that a formal system of accreditation might have 'attractions' (for example, ensuring that 'responsible NGOs get the advantage of a closer relationship with the WTO'), it would impose a continuing bureaucratic burden to receive, sieve and make judgments about candidate NGOs.⁸² As long as NGOs have no consultative status with the WTO (i.e. not allowed to participate in the meetings of WTO bodies), it is indeed doubtful whether a formal system of accreditation is 'a worthy investment for a small organisation with a limited budget'.⁸³

⁸⁰ To prove its non-profit character, an NGO is required to produce registration documents or a charter pointing to the aims of the organisation. If these are not available, the WTO requires at least production of documents that would prove that the organisation formally exists. Strictly speaking, the non-profit character is not a criterion for selection *among* NGOs but rather a feature characteristic of all NGOs that distinguishes them from other types of organisations.

⁸¹ Note that for the Hong Kong Session of the Ministerial Conference, the accreditation procedure is waived for those NGOs that were duly registered for at least two previous Sessions of the Ministerial Conference. See WTO Ministerial Conference, *Procedures Regarding Registration and Attendance of Non-Governmental Organizations at the Sixth Session of the Ministerial Conference*, WT/MIN(05)/INF/6, dated 1 June 2005.

⁸² Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Sutherland Report), January 2005. Available at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future, visited on 7 June 2005, para. 207.

⁸³ *Ibid.*, para. 208. The Report did, however, suggest formalising the 'criteria to be employed in selecting those civil society organisations with which the Secretariat might develop more systematic and in-depth relations.'

VI. Conclusion

When one compares the extent of current WTO engagement with NGOs with the extent of GATT or early WTO engagement with NGOs, it is clear that big strides forward have been made. Largely due to the efforts of the WTO Secretariat, the relations between the WTO and NGOs are currently more meaningful, more constructive and less antagonistic than ever before. The involvement of NGOs in the policy-making, policy-implementation, compliance-monitoring and dispute-settlement activities of the WTO remains, however, quite modest. The potential of Article V:2 of the *WTO Agreement* has definitely not been exploited by the WTO Members. As stated in the *1996 Guidelines*, it was and still is not ‘possible for NGOs to be directly involved in the work of the WTO or its meetings.’⁸⁴ With the exception of the formal plenary meeting of the Ministerial Conference, NGOs are not allowed to attend – let alone – actively participate in any meeting of WTO bodies.

When addressing the question whether there is a need and/or scope for more NGO involvement in the activities of the WTO, the 2005 Sutherland Report on ‘*The Future of the World Trade Organization*’ first noted (in line with the view held by most – if not all – WTO Members) that the primary responsibility for engaging civil society in trade policy matters rests not with the WTO but with its Members.⁸⁵ The Sutherland Report also noted that while all international organisations shared common objectives in the pursuit of transparency, each organisation’s peculiar mandate and structure might call for specific objectives, forms of involvement and the choice of civil society organisations with whom to collaborate.⁸⁶ According to the Sutherland Report, within the limited bounds of an institution, such as the WTO, founded on contractual commitments negotiated among governments, there are therefore limits to how much further the WTO can go in involving NGOs in its deliberations and processes.⁸⁷ The Sutherland Report called upon the WTO Members to develop a new set of clearer guidelines for the relations of the WTO Secretariat with NGOs and to scale up the administrative capacity and financial resources

⁸⁴ Decision by the General Council, *Guidelines for arrangements on relations with Non-Governmental Organizations*, para. VI.

⁸⁵ Sutherland Report, para. 212.

⁸⁶ Sutherland Report, para. 186 and 212.

⁸⁷ Sutherland Report, paras. 179 and 206.

of the WTO Secretariat.⁸⁸ The Sutherland Report referred to new ‘systematic and in-depth relations’ between the WTO Secretariat and NGOs but was silent about the types of activities that such relations could comprise. Such activities could include, for example, joint WTO Secretariat-NGO research projects and NGO involvement in WTO training and technical assistance programmes. The Sutherland Report, however, did not offer any substantial improvements in the degree of WTO’s engagement with NGOs. Rather, it called for streamlining and further developing the existing forms of engagement, with an emphasis on the Secretariat’s (as opposed to WTO membership’s) relations with NGOs.

While appreciating the wisdom of limiting proposal for reform to ‘realizable’ reforms, rather than proposing more substantial changes for which there is no support anyway, the Sutherland Report shows a regrettable lack of ambition in the area of dialogue with civil society. It could be argued that the WTO can and should engage with NGOs, and allow for NGO involvement, more than it currently does. Why can (selected) NGOs not have observer/consultative status in WTO bodies? In the United Nations, UNCTAD, the ILO, WIPO and other international organizations that deal with economic matters, NGOs have such status and participate in the meetings of the bodies of these organisations. Why is this not possible in the WTO? Does the intergovernmental character of the WTO prevent granting NGOs observer/consultative status? Would further engagement with NGOs, in particular, by allowing (selected) NGOs to participate in formal meetings of its bodies, be counterproductive to the conduct of negotiations within the WTO? The Report recognizes that it is important that the WTO is perceived as democratic and transparent and that dialogue with civil society would help to promote the image of the WTO as an effective and equitable organization. Why then does the Report not argue for more engagement with civil society? Justified concerns about the legitimacy, accountability, and the politics of NGOs could be taken away, or at least mitigated, by introducing a system of accreditation. The Sutherland Report correctly observes that NGO involvement must have its limits, but these limits have not been reached yet. The glass is still half-empty.

⁸⁸ *Ibid.*, para. 212.

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